

DECISION



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THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548 *24288*

FILE: B-207458

DATE: February 17, 1983

MATTER OF: Bolar Pharmaceutical Co., Inc.

DIGEST:

1. Protest will be considered timely where a reasonable doubt exists as to the date that the protester first learned the basis for its protest.
2. Protest against the cancellation of a request for proposals (RFP) for a drug and the award of a sole-source contract to a competitor under an earlier-issued solicitation for several drugs, including the drug solicited by the canceled RFP, is sustained. The agency's proper course of action was to make an award under the earlier-issued, sole-source solicitation for all but the one drug solicited under the second RFP, wait for the results on the protester's preaward survey, award a contract to the protester under the second solicitation, and then conduct a competitive procurement to fulfill its remaining needs for that one particular drug. GAO recommends reinstatement of the canceled solicitation and award to protester.

Bolar Pharmaceutical Co., Inc. (Bolar), protests the cancellation of request for proposals (RFP) No. DLA120-82-R-1194 (RFP -1194) and the award of a sole-source contract to Berlex Laboratories, Inc. (Berlex), under RFP No. DLA120-81-R-2463 (RFP -2463).

We sustain the protest.

Both solicitations were issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA). RFP -2463 was issued on a sole-source basis to Berlex on August 6, 1981, and called for the procurement of six different drugs, among them quinidine gluconate, a drug used for the treatment of certain heart conditions. The solicitation was designed to satisfy all of DLA's requirements, as well as those of the Veterans Administration (VA), for a period of 1

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year, starting on the date of award. However, DLA encountered some difficulties during negotiations because of Berlex's proposed subcontracting plan and because Berlex proposed to charge DLA higher prices for two of the items than it intended to charge the VA. As a result of these problems, no award was made and the two parties continued to negotiate.

The delay in an award under RFP -2463 created a shortage of quinidine gluconate for both DLA and the VA. In order to avoid the danger of exhausting the supply of this drug before the completion of negotiations, DLA decided to issue a new solicitation for about one-third of the requirement as a stopgap measure. This solicitation, RFP -1194, was issued on February 22, 1982, with the understanding that only Berlex was capable of fulfilling the requirement. By March 15, 1982, the closing date for the receipt of proposals under RFP -1194, DLA had an offer from Berlex and an unexpected offer from Bolar, as follows:

	<u>Unit Price</u>	<u>Total Price</u>
Berlex	\$42.00	\$423,360
Bolar	33.40	336,672

Berlex's unit price was identical to the one it was offering under RFP -2463.

As negotiations under RFP -2463 continued, Berlex from time to time extended the acceptance period for its offer, the latest until March 19, 1982. As this deadline approached, the contracting officer asked Berlex to extend the acceptance period. However, Berlex refused to grant another extension. In the contracting officer's opinion, Bolar could not be considered an approved source until after the United States Food and Drug Administration (FDA) conducted a preaward survey of the firm. Berlex's refusal to extend its acceptance period beyond March 19 presented the contracting officer with the dilemma that, while waiting for the results of an FDA preaward survey on Bolar, Berlex's offer under RFP -2463--a procurement involving five additional drugs besides the quinidine gluconate requirement--would expire, requiring a resolicitation. Concerned with the probability of supply shortages for both DLA and the VA, as well as with the likelihood of increased prices for most of the items if a new solicitation was required, the contracting officer, after oral approval from DLA Headquarters, awarded Berlex a contract under RFP -2463 on March 19, 1982, which included the total requirement for quinidine gluconate.

Although it had already awarded a contract which made RFP -1194 unnecessary, on March 22, 1982, DLA requested that FDA conduct a preaward survey of Bolar. FDA completed its survey on April 13, 1982, finding Bolar a qualified manufacturer of quinidine gluconate. Then, on April 20, 1982, DLA canceled RFP -1194 and sent Bolar notification of this decision.

Bolar filed its protest with our Office on May 11, 1982, arguing that the sole-source award to Berlex for quinidine gluconate was unjustified in view of Bolar's availability as a second source, as well as Bolar's lower price, that DLA's cancellation of RFP -1194 was unjustified, and that the manner in which DLA had conducted the two procurements had been patently unfair to Bolar. In its protest letter, Bolar stated that it had "learned of the basis for this protest within the last 10 working days." Nothing in this letter otherwise indicated that Bolar had learned of the basis for its protest more than 10 working days prior to its May 11 filing. In response to the Agency's protest report, which provided a rationale for the Agency's actions, Berlex raised the argument that Bolar's protest was untimely and should be dismissed.

In its comments, Berlex states that Bolar knew no later than April 23, 1982, that a contract had been awarded to Berlex which included DLA's requirements for quinidine gluconate and, also, that RFP -1194 had been canceled and the reasons for that cancellation. According to Berlex, the president of Bolar telephoned the DLA contracting office on April 23 to inquire about the cancellation of RFP -1194. Berlex argues that during this conversation, Bolar was given sufficient information to know the basis of its protest. In light of this, Berlex concludes that Bolar's May 11 protest was more than 10 working days after it knew its basis for protest and under our Bid Protest Procedures was, therefore, untimely. See 4 C.F.R. § 21.2(b)(2) (1982).

After further investigation, DLA also argues that Bolar's protest is untimely. DLA has furnished our Office with signed, notarized affidavits from its contracting personnel which essentially confirm the Berlex account of the April 23 telephone conversation.

Bolar, however, argues that during the April 23 telephone conversation, the contracting officer only confirmed that RFP -1194 had been canceled and refused to tell Bolar why this action had been taken. According to Bolar, it did not obtain sufficient information from DLA as to a

possible basis of protest against the cancellation until May 3, 1982. Thus, in Bolar's opinion, its May 11 protest was timely filed.

It is well established that where a reasonable doubt exists as to the date that a protester first learned the basis for its protest, that doubt will be resolved in favor of the protester for purposes of our timeliness rules. See Professional Materials Handling Co., Inc., B-205969, April 2, 1982, 82-1 CPD 297. Therefore, since the record is unclear as to exactly when Bolar first learned the basis for its protest, we resolve the doubt in Bolar's favor and find its protest timely filed.

Bolar argues that DLA awarded an improper sole-source contract and that the decision to require Bolar to undergo an FDA preaward survey was, in effect, a ploy to delay any action under RFP -1194 while DLA made an award to Berlex under RFP -2463. While we do not agree with Bolar's specific view of the facts in this case, we do agree that DLA's actions were improper.

As noted above, RFP -1194 was a stopgap measure for approximately one-third of DLA's requirement for quinidine gluconate. From the record presented, DLA was apparently willing to make the award to Bolar under RFP -1194, provided that FDA first conducted a preaward survey to determine whether Bolar was a responsible offeror. This process was disrupted when Berlex refused to extend its acceptance period under RFP -2463. Berlex's decision meant that DLA was faced with a potential shortage of not only quinidine gluconate, but five other drugs if it allowed Berlex's offer to lapse. In our opinion, this factor justified the DLA decision to make an award under RFP -2463.

However, DLA should not have awarded the quinidine gluconate requirement under RFP -2463. Berlex's proposal was not "all or none." Therefore, DLA could have made an award under RFP -2463 for all drugs except quinidine gluconate. Although DLA has argued that its need for quinidine gluconate was critical, it must be noted that, when DLA asked Berlex in March to grant another extension of its offer acceptance period, DLA was indicating, in effect, that it could wait for FDA to complete a preaward survey of Bolar before making an award for a stopgap supply of quinidine gluconate. In this regard, we note that all prior extensions were for several weeks, and the FDA preaward survey was completed approximately 3 weeks after the award. Furthermore, delivery under both RFP -2463 and RFP -1194 was not scheduled to begin until July 30, 1982. Thus, an award

under RFP -2463 did not accelerate delivery. Finally, quinidine gluconate was one of the two drugs for which Berlex proposed to charge DLA more than it was going to charge the VA. This should have been an additional incentive for DLA to pursue an award to Bolar.

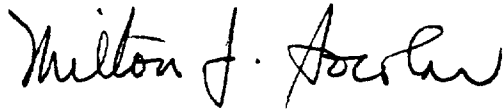
In view of the foregoing, we believe that the proper course of action was for DLA to award a contract to Berlex under RFP -2463 for all the drugs except quinidine gluconate. DLA should have then waited for FDA to complete its preaward survey of Bolar, awarded Bolar a contract under RFP -1194, and then conducted a competitive procurement for the remainder of its quinidine gluconate requirement. If FDA had returned a negative preaward survey on Bolar, DLA could have awarded Berlex a contract under RFP -1194 and then conducted sole-source negotiations with Berlex for the rest of its quinidine gluconate requirement.

Since Bolar should have received an award under RFP -1194, we recommend that DLA study the feasibility of reinstating that solicitation and making an award to Bolar for the amount solicited, provided that Bolar is willing to accept such an award at its offered price and DLA has a continuing requirement for quinidine gluconate. If all these factors are present, DLA should terminate for the convenience of the Government the contract awarded to Berlex as to the line item for quinidine gluconate only and make the award to Bolar. See Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348. Moreover, DLA should conduct competitive procurements for quinidine gluconate in the future since it is now aware of at least two qualified sources for this drug.

The protest is sustained.

Since this decision contains a recommendation for corrective action, we are furnishing a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, formerly section 1176, which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and the House and Senate Committees on Appropriations concerning the action taken with respect to our recommendations.

By separate letter of today, we are also notifying the Director, DLA, of our recommendations and his obligations under section 236.

for 
Comptroller General
of the United States